Supreme Court, U.S.
FILED
JUL 23 2002
CLERK

(3)

No. 01-1873

In the Supreme Court of the United States

RICHARD VIETH, ET AL.,
Appellants

v.

ROBERT C. JUBELIRER, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM OF APPELLEES SCHWEIKER, WEAVER AND FILLING

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General
Counsel of Record

J. BART DELONE
Senior Deputy Attorney General

Counsel for Appellees Schweiker, Weaver and Filling

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1144

BEST AVAILABLE COPY

31pg

QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction over this appeal because it was not timely filed?

2. Whether the District Court correctly dismissed the appellants' claim of partisan gerrymandering in Pennsylvania's congressional redistricting plan?

PARTIES TO THE PROCEEDING

The appellants are Richard and Norma Jean Vieth and Susan Furey.

The appellees on whose behalf this motion is filed are Mark S. Schweiker, the Governor of Pennsylvania; C. Michael Weaver, the Secretary of the Commonwealth[1]; and Richard Filling, the Commissioner of Pennsylvania's Bureau of Commissions, Elections and Legislation.

Other appellees, separately represented, are Robert C. Jubelirer, the Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; Matthew J. Ryan, Speaker of the Pennsylvania House of Representatives; and the Republican Caucus of the Pennsylvania House of Representatives. In addition, Robert J. Mellow, a Pennsylvania state senator, has moved to intervene in the District Court, and his motion was pending when this motion was filed.

---

[1]Mr. Weaver has been substituted for his predecessor, Kim Pizzingrilli, pursuant to Supreme Court Rule 35.3.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

THE COURT SHOULD DISMISS THIS APPEAL AS UNTIMELY, OR IN THE ALTERNATIVE SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION 7

I. The Court Lacks Jurisdiction over this Appeal, Which Is Untimely 7

II. The District Court Correctly Dismissed the Appellants' Claim of Partisan Gerrymandering, and Appellants Have Not Presented a Substantial Question to the Contrary 10

A. Appellants' claim that they were deprived of proportional representation is foreclosed by *Davis v. Bandemer* 10

B. *Shaw v. Reno* and its progeny do not change this result 13

C. Article I, Section 4 of the Constitution adds nothing to appellants' equal protection claim . . . 15

CONCLUSION 16

APPENDIX

District Court Order (April 23, 2002) 1a

District Court Order (May 2, 2002) 3a

District Court Order (June 19, 2002) 5a

TABLE OF AUTHORITIES

Cases **Page**

Curtiss-Wright Corp. v. General Electric Co.,
446 U.S. 1 (1980) 9
Davis v. Bandemer,
478 U.S. 109 (1986) 4, 5, 10-15
Easley v. Cromartie,
532 U.S. 234 (2001) 15
Erfer v. Commonwealth,
794 A.2d 325 (Pa. 2002) 11
Green Tree Financial Corp — Alabama v. Randolph,
531 U.S. 79 (2000) 8
Hunt v. Cromartie,
526 U.S. 541 (1999) 14
Shaw v. Reno,
509 U.S. 630 (1993) 13, 14
Territo v. United States,
358 U.S. 279 (1959) 10
United Jewish Organizations of Williamsburg, Inc. v. Carey,
430 U.S. 144 (1977) 15
United States Civil Service Comm. v. Ramos,
426 U.S. 916 (1976) 9

Statutes and Rules

2 U.S.C. § 2a 16
2 U.S.C. § 2c 16
28 U.S.C. § 1253 1
28 U.S.C. § 2101 . . . . . 1, 7-9
28 U.S.C. § 2284 4
42 U.S.C. § 1983 . . . . . 2, 5
Fed. R. Civ. Proc. 54 9
Pa. Act 2002-1, § 1, *to be codified at* Pa. Stat. Ann., tit. 25, § 3595.1 (Purdon) 2-6, 16

Pa. Act 2002-34, *to be codified at*
Pa. Stat. Ann., tit. 25, §§ 3595.101
through 3595.501(Purdon) 2, 6
Sup. Ct. R. 13 8
Sup. Ct. R. 18 . . . . . 7, 8
Sup. Ct. R. 35 ii

Constitutional Provisions

U.S. CONST., Amend. I 5
U.S. CONST., Amend. XI 5
U.S. CONST., Amend. XIV, § 1
(Equal Protection Clause) 1, 11, 15, 16
U.S. CONST., Amend. XIV, § 1
(Privileges and Immunities Clause) 5
U.S. CONST., Art. I, § 2 16
U.S. CONST., Art. I, § 4 . . . . . 1, 15, 16

Other Authorities

G. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair,*
Legal Intelligencer, May 20, 2002 3
M. Lewyn, *How to Limit Gerrymandering*
45 FL. L. REV. 403 (1993) 11

OPINIONS BELOW

The District Court's opinion of February 22, 2002 is reported at 188 F.Supp.2d 532 and is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a. A later opinion of the District Court, filed on April 8, 2002, is reported at 195 F.Supp.2d 672 and is reprinted at J.S. App. 34a.

STATEMENT OF JURISDICTION

As we explain more fully in the argument section of this motion, the Court lacks jurisdiction over this appeal because it is untimely. This is an appeal from an interlocutory order issued by a three-judge district court denying an injunction, and the appellants assert that the Court has jurisdiction over it pursuant to 28 U.S.C. § 1253. The District Court's order was entered on February 22, 2002, and the appellants filed their notice of appeal *sixty* days later, on April 23, 2002. J.S. at 1. *Cf.* 28 U.S.C. § 2101(b) (direct appeal to Supreme Court from interlocutory order of district court to be taken within *thirty* days).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 4 of the Constitution provides in relevant part that "[t]he times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof...."

2. Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

3. Section 1 of Pennsylvania's Act 2002-1 ("Act 1"), *to be codified at* Pa. Stat. Ann., tit. 25, § 3595.1(Purdon), is not reprinted in the Appendix to the Jurisdictional Statement, although several maps which purport to reflect Act 1 are reprinted at J.S. App. 135a-37a. Act 1 is reprinted in 2002 Purdon's Pa. Leg. Serv. No. 1, and is available on WestLaw at PA ST 25 P.S. § 3595.1.[2]

4. Pennsylvania's Act 2002-34 ("Act 34"), *to be codified at* Pa. Stat. Ann., tit. 25, §§ 3595.101 through 3595.501(Purdon), is not reprinted in the Appendix to the Jurisdictional Statement. It is available on WestLaw at PA ST 25 P.S. § 3595.101 *et seq.*[3]

STATEMENT OF THE CASE

This case arises out of the congressional redistricting plan adopted by the Pennsylvania legislature in the wake of the 2000 decennial census. The appellants are three Pennsylvania voters who claim that this redistricting plan offends the Constitution. They brought this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the Governor of Pennsylvania and other state officials.

1. As a result of the 2000 decennial census, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives. J.S. App. 2a. In response, the Pennsylvania General Assembly enacted Act 2002-1 ("Act 1"), which redivided the

---

[2]Act 1 is also reprinted in the Appendix to the Jurisdictional Statement in No. 01-1823 at 54a (filed June 10, 2002).

[3]Act 34 is also reprinted in the Appendix to the Jurisdictional Statement in No. 01-1823 at 69a (filed June 10, 2002).

Commonwealth among nineteen congressional districts.[4] Although the appellants condemn Act 1 as an exercise in "extreme ... partisan bias,"[5] J.S. at 3, they acknowledge (in a footnote) that in fact Act 1 enjoyed bipartisan support. J.S. at 3 n.1. Forty-two — nearly half — of the members of the Democratic Caucus of the Pennsylvania House of Representatives voted in favor of Act 1, and without the support of these House Democrats Act 1 would not have passed. J. S. App. 77a.

Of the Commonwealth's roughly 7.7 million registered voters, about 3.7 million (48%) are Democrats, and about 3.2 million (42%) are Republicans. J.S. App. 72a. Of the nineteen congressional districts created by Act 1, seven have a majority Democrat registration and seven have a majority Republican registration. In the remaining five districts, two have a Democrat plurality of registered voters and three have a Republican plurality. J.S. App. 78a-79a. Nevertheless, appellants allege that, in elections held in these districts, Republicans are likely

---

[4]Act 1, *to be codified at* Pa. Stat. Ann., tit. 25 §3595.1 (Purdon), is not reprinted in the Appendix to the Jurisdictional Statement. It is available in 2002 Purdon's, Pa. Leg. Serv. 1 and on WestLaw at Pa. St. 25 P.S. §3595.1. Act 1 is also reprinted in the Appendix to the Jurisdictional Statement at No. 01-1823 at 54a (filed June 10, 2002).

[5]Appellants, relying on an opinion piece in a legal newspaper, say that Act 1 "received national attention as 'the most partisan congressional gerrymander of this young century, and among the worst in the last several decades of the earlier millennium.'" J.S. at 3, *quoting* G. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair*, Legal Intelligencer, May 20, 2002. The newspaper notes, as the appellants do not, that this hyperventilating assessment comes from a Democrat Party ward officer. *Ibid*, available on WestLaw at 5/20/2002 Legal Intelligencer 6.

to win thirteen of the nineteen seats, and Democrats six.[6] J.S. App. 126a.

The appellants also assert that Republicans have "essentially shut Democrats and Democratic voters out of the political process." J.S. App. 128a. The complaint, however, contains no allegations to support this conclusory assertion. As the District Court remarked,

> there are no allegations that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of pubic concern.

J.S. App. 27a.

2. The voters brought this action in the Middle District of Pennsylvania, which convened a three-judge court pursuant to 28 U.S.C. § 2284. In the District Court, the voters raised two principle claims: first, that the congressional districts drawn by Act 1 represented an impermissible partisan gerrymander, in violation of the principles recognized in *Davis v. Bandemer*, 478 U.S. 109 (1986); and second, that Act 1's districts were not precisely equal and therefore violated the Constitution's guarantee of one person, one vote. J.S. at 4-5; J.S. App. 6a-7a.

---

[6]In Pennsylvania's current congressional delegation, eleven members are Republicans and ten are Democrats. J.S. App. 73a. In statewide elections since 1998, Republican candidates have won thirteen elections and Democrats have won three. J.S. App. 73a-75a.

On February 22, 2002, the District Court dismissed the appellants' partisan gerrymandering claim.[7] J.S. App. 28a, 32a-33a. The District Court held that

> [appellants'] allegations amount to this[:] Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing their candidates.

J.S. App. 25a. This, the District Court said, "is simply an argument for proportional representation. However, *Bandemer* soundly rejected such a basis for an equal protection violation." *Ibid.* The District Court therefore held that appellants' allegations were "insufficient to make out a cause of action" under *Bandemer.* The District Court, however, declined to dismiss appellants' one person, one vote claim. J.S. App. 16a-20a.

On April 8, 2002, after an evidentiary hearing, the District Court by a divided vote struck down Act 1 on one person, one vote grounds.[8] J.S. App. 34a. The District

---

[7]At the same time, the District Court dismissed claims based on the Privileges and Immunities Clause, the First Amendment, and Section 1983, for failure to state a claim, and dismissed all claims against the Commonwealth itself on the basis of the Commonwealth's Eleventh Amendment immunity. J.S. App. 10a-11a, 28a-30a.

[8]The census reported that Pennsylvania's total population was 12,281,054 persons, so that the "ideal" population for each of the Commonwealth's nineteen congressional districts is either 646,371 or 646,372 persons. J.S. App. 34a-35a, 46a n.6. None of the congressional districts created by Act 1 has a population which is more than ten

(continued...)

Court enjoined the implementation of Act 1, and ordered the Pennsylvania General Assembly to enact a new redistricting plan and submit it to the court for its review and approval. J.S. App. 45a. The District Court retained jurisdiction "pending issuance of a final order." *Ibid.*

The District Court stayed its injunction pending the disposition of appeals taken by the Governor and other defendants,[9] and Pennsylvania held its primary election on May 21, using the congressional districts drawn by Act 1. In the meantime, the Pennsylvania General Assembly enacted a revised congressional redistricting plan, known as Act 2002-34 ("Act 34") which the Governor signed into law on April 18, 2002.

As of the filing of this motion, the District Court has not yet issued a final order. The District Court has retained jurisdiction to decide whether Act 34 remedies the constitutional violations which it found in Act 1, but has not yet decided that issue. *See* Dist. Ct. Order of April 23, 2002. At the District Court's order, the defendants submitted a status report on June 3, 2002;

---

[8](...continued)
persons above or below this "ideal" population; and Act 1's overall deviation from absolute equality — that is, the difference between the most and least populous districts — is nineteen persons, or 0.003%. J.S. App. 36a.

[9]The appeal of the Governor and other executive branch defendants is docketed at No. 01-1823; and the appeal of defendants from the legislative branch is docketed at No. 01-1817. The District Court, by order entered on April 12, 2002, initially declined to stay its order, and the Governor and other defendants applied for a stay to Justice Souter as Circuit Justice for the Third Circuit. While that application was pending, the District Court granted a renewed motion for a stay, by order entered April 23, 2002.

and the District Court has ordered that a further status report be filed by August 19, 2002. *See* Dist. Ct. Orders of May 2 and June 19, 2002.[10]

3. In the meantime, appellants appealed the District Court's February decision dismissing their partisan gerrymandering claim to this Court. The District Court's order was entered on February 22, and the appellants filed their notice of appeal sixty days later, on April 23, 2002. J.S. at 1.

THE COURT SHOULD DISMISS THIS APPEAL AS UNTIMELY, OR IN THE ALTERNATIVE SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION

I. The Court Lacks Jurisdiction over this Appeal, Which Is Untimely.

The appellants filed their notice of appeal in the District Court on the sixtieth day after the entry of the order appealed from. J.S. at 1 ("The notice of appeal was filed 60 days later.") The governing statute, however, required them to file within thirty days, and the Court therefore lacks jurisdiction over their appeal.

This Court's Rule 18 provides that when a direct appeal from a district court decision is authorized, the appeal is commenced by filing a notice of appeal in the district court "within the time provided by law...." Sup. Ct. R. 18.1. The time for taking such appeals is in turn governed by 28 U.S.C. § 2101. Section 2101 first provides, in subsection (a), that a direct appeal to this Court from an order holding an Act of Congress

---

[10]The District Court's orders of April 23, May 2 and June 19, 2002, are reprinted in the Appendix to this motion.

unconstitutional shall be taken within thirty days after the entry of the decision appealed from. The statute then goes on, in subsection (b), to provide that

> any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action ... shall be taken *within thirty days* from the judgment, order or decree, appealed from, *if interlocutory*, and within sixty days, if final.

Id., § 2101(b) (emphases added). Section 2101(b) does not empower the Court to extend these times, and the Court's Rule 18.1 recognizes that "[t]he time to file may not be extended." *Cf.* 28 U.S.C. § 2101(c) (time for filing petition for writ of certiorari may be extended for good cause); Sup. Ct. R. 13.5 (same).

In this case, the order appealed from — the order of February 22, 2002 — is plainly interlocutory rather than final. The appellants characterize this order as a "final" dismissal of their partisan gerrymandering claim, J.S. at 1, but that is incorrect. As the Court has often said,

> the term "final decision" has a well-developed and longstanding meaning. It is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.

Green Tree Financial Corp — Alabama v. Randolph, 531 U.S. 79, 86 (2000) (internal quotation marks and citations omitted). The order appealed from in this case is not such an order.

As the appellants themselves recognize, the action they filed involves multiple claims presented by multiple parties, J.S. at 4-5; and — as again the appellants

BEST AVAILABLE COPY

recognize — the order they are appealing did not adjudicate all of those claims. J.S. App. 31a-32a; *see* J.S. at 7 ("Appellants' one-person, one-vote claim was not dismissed [by the February 22 order].")[11] The rules of civil procedure provide that in such a case, a district court *may*, under certain circumstances, direct the entry of a final judgment as to the claims decided. Fed. R. Civ. Proc. 54(b). *See generally Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). But if that does not happen — and it did not happen here — then Rule 54(b) provides that

> any order ... which adjudicates fewer than all the claims ... shall not terminate the action as to *any* of the claims ... and is subject to revision at any time before the entry of judgment adjudicating all the claims.

Ibid (emphasis added).

The District Court's February 22 order, which adjudicated "fewer than all the claims," thus did "not terminate the action as to [appellants' partisan gerrymandering] claim[]," and is "subject to revision at any time" until all their claims have been adjudicated — an event which has not yet happened. It is an interlocutory order within the meaning of 28 U.S.C. § 2101(b), and the thirty-day limit for filing a notice of appeal applies. Since the appellants concede that they did not file their notice of appeal until the sixtieth day, J.S. at 1, their appeal is untimely and the Court should dismiss it for lack of jurisdiction. *See United States Civil Service Comm. v. Ramos*, 426 U.S. 916 (1976) (per curiam)(appeal dismissed for lack of jurisdiction where

---

[11]Indeed, the District Court has not, to this day, entered a final order in this action. *See supra* at 5-7.

notice of appeal not filed within 30 days of any arguably appealable order); *Territo v. United States*, 358 U.S. 279 (1959)(per curiam)(appeal dismissed where notice of appeal not filed within the time provided by law).

In any event, the District Court correctly decided appellants' partisan gerrymandering claim and the Court, if it decides their appeal at all, should summarily affirm the District Court's decision.

II. The District Court Correctly Dismissed the Appellants' Claim of Partisan Gerrymandering, and Appellants Have Not Presented a Substantial Question to the Contrary.

A. Appellants' claim that they were deprived of proportional representation is foreclosed by *Davis v. Bandemer*.

As the District Court recognized, appellants' political gerrymandering claim "is simply an argument for proportional representation." J.S. App. 25a. And as the District Court correctly pointed out, allegations of this kind, without more, "are insufficient to make out a cause of action for violation of equal protection." *Ibid, citing Davis v. Bandemer*, 478 U.S. at 130. Rather, *Bandemer* required the appellants to establish, not just a history of disproportionate election results, but *also* that "the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voter's influence on the political process as a whole." J.S. App. 21a-22a, *quoting Bandemer*, 478 U.S. at 105.

The appellants argue, not merely that *this* District Court erred in reading *Bandemer* this way, but that *every* case applying *Bandemer* — including a slew of decisions summarily affirmed by this Court — has committed the same error. J.S. at 19 ("All of the cases construing

Bandemer share the same ... basic flaws.") *See* J.S. at 16 n.5 (collecting cases summarily affirmed by the Court). In the appellants' view, *Bandemer* required them to show "a history (actual or projected) of disproportionate results," and nothing more. J.S. at 22. We submit, however, that this argument does not present a substantial question for the Court's consideration; it is the appellants, and not the entire federal judiciary, who misunderstand *Bandemer*.

There is no question that *Bandemer* is, in many respects, a problematic decision which has been severely criticized both within and without the Court. *Bandemer's* holding that a claim of partisan gerrymandering presents a justiciable claim was adopted only over the vigorous dissent of three Justices. *See id.*, 478 U.S. at 144 (O'Connor, J., concurring in the judgment). Further, the lack of a majority opinion on the elements of such a claim, and what the District Court in this case called the "recondite standard" in the plurality opinion, J.S. App. 22a, offer little guidance to the lower courts. *See Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002), *reprinted at* J.S. App. 60a ("plurality's opinion ... obscur[es] precise nature of the standard to be employed"); M. Lewyn, *How to Limit Gerrymandering*, 45 FL. L. REV. 403, 443 (1993)(collecting commentary).

Nevertheless, on the point raised by the appellants, *Bandemer* could not be more clear: all seven of the Justices who concurred in the judgment flatly rejected the idea that a lack of proportional representation, without more, violates the Equal Protection Clause. As the *Bandemer* plurality said,

> Our cases ... clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw

> district lines to come as near as possible to allocation seats to the contending parties in proportion to what their anticipated statewide vote will be.

Id., 478 U.S. at 130 (plurality opinion). To the contrary,

> [W]e have required a *substantially greater showing of adverse effects than a mere lack of proportional representation* to support a finding of unconstitutional vote dilution. ... These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group ... to elect the representatives of its choice does not render that scheme constitutionally infirm.

Id., 478 U.S. at 131 (plurality opinion) (emphasis added). *Accord id.*, at 145 (O'Connor, J., concurring in the judgment) (proportional representation not "consistent with our history, our traditions, or our political institutions"), 155 (proportionality requirement would be "calamitous for the federal courts, for the States, and for our two-party system").

Thus, there may well be doubts about the correctness of *Bandemer's* holding that claims of partisan gerrymandering are justiciable at all. And if such claims are justiciable, there may well be doubts about the precise nature of the "substantially greater showing of adverse effects," beyond a mere lack of proportional representation, which a plaintiff must make to establish such a claim. But there is no doubt at all that *some* showing beyond a mere lack of proportionality must be made, and that appellants failed to make *any* such showing in this case. The appellants have thus not raised

any substantial question about the correctness of the District Court's reading of *Bandemer*.

B. *Shaw v. Reno* and its progeny do not change this result.

Appellants argue, however, that the Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny have changed — or as they put it, "clarified" — the analysis of partisan gerrymandering claims from that set forth in *Bandemer*. J.S. at 23-26. According to the appellants, drawing districts on partisan lines is constitutionally indistinguishable from drawing them on racial lines, and should be analyzed the same way. J.S. at 24. *Shaw* itself, however, explicitly rejects this premise.

The Court in *Bandemer* rejected the view, expressed in Justice Powell's dissenting opinion, that "the intentional drawing of district boundaries for partisan ends and for no other reasons violates the equal protection clause in and of itself." *Bandemer*, 478 at 138 (plurality opinion); *id.*, at 144 (O'Connor, J., concurring in the judgment) (partisan gerrymandering claims not justiciable at all). In *Shaw v. Reno, supra*, on the other hand, the Court held that "segregat[ing] voters into separate voting districts because of their race" does violate the Equal Protection Clause, unless it is narrowly tailored to serve a compelling state interest. *Id.*, 509 U.S. at 658. As the Court remarked:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

Id., at 647.

The Court, however, specifically rejected the appellants' notion that this approach to *racial* gerrymandering claims would likewise apply to claims of *partisan* gerrymandering.

> Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. *It therefore warrants different analysis.*
>
> The dissenters ... suggest that a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders. ... But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race... — would seem to compel the opposite conclusion.

Id., at 650 (emphasis added). Even the dissenters in *Shaw* did not adopt the appellants' position. They argued, not that claims of partisan gerrymandering should be analyzed under *Shaw*, but the other way around: that the racial gerrymandering claim in *Shaw* should have been analyzed under the relatively lenient standard of *Bandemer*. *Shaw*, 509 U.S. at 662-63 (White, J., dissenting).

Later cases, as the appellants concede, continue to recognize this "distinction between race and politics as districting criteria." J.S. at 24, *citing Hunt v. Cromartie*,

526 U.S. 541 (1999) *and Easley v. Cromartie*, 532 U.S. 234 (2001). As Justice O'Connor succinctly put it, "[p]olitical affiliation is the keystone of the political trade. Race, ideally, is not." *Bandemer*, 478 U.S. at 161 (O'Connor, J., concurring in the judgment), *quoting United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring). That distinction is firmly rooted in our history and in the Constitution, and appellants have offered no substantial reason to reexamine it.

C. Article I, Section 4 of the Constitution adds nothing to appellants' equal protection claim.

Finally, appellants claim that Article I, § 4 of the Constitution places limits on the States' redistricting authority which are more stringent than those of the Equal Protection Clause as interpreted in *Bandemer*. J.S. at 26. They offer no principled reason, however, why this should be so, and neither text of Article I, § 4, nor the Court's decisions, offer them any support.

Article I, §4 provides that:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This provision is, on its face, a positive grant of authority to the States; it does not, by its terms, forbid the States from doing anything, nor has the Court so interpreted it. When the Court has invalidated state election measures, it has done so either because the measures violated other provisions of the Constitution, *see U.S. Term Limits v.*

Thornton, 514 U.S. 779 (1995) (term limit on members of Congress violated Qualifications Clauses); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (grossly malapportioned congressional districts violated Art. I, § 2); or because they exceeded the authority conferred by Article I, § 4, and were therefore simply beyond the States' power. *See Cook v. Gralike*, 531 U.S. 510 (2001). But appellants have cited no case in which the Court has held that a state provision *violated* Article I, § 4.

In this case, there is no question of Pennsylvania having exceeded its Article I, § 4 authority. Congress, exercising its own authority under Article I, § 4, has authorized and required the States to establish congressional districts. *See* 2 U.S.C. § 2c ("In each State entitled ... to more than one Representative ... there shall be established a number of districts equal to the number of Representatives...."); *id.*, § 2a (after reapportionment, States to be "redistricted in the manner provided by the law thereof"). Unless, therefore, Pennsylvania's Act 1 violates some other constitutional provision — such as the Equal Protection Clause — it must be upheld.

We have thus come full circle. Neither appellants' Article I, § 4 claim, nor their equal protection claim, presents a substantial question justifying plenary consideration by the Court.

CONCLUSION

The Court should dismiss this appeal, or in the alternative should summarily affirm the District Court's order.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
Chief Deputy Attorney General
Counsel of Record

J. BART DELONE
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1144

Counsel for Appellees Schweiker, Weaver and Filling

July 26, 2002

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	**Civil No. 1:CV-01-2439**
Plaintiffs	:	**NYGAARD, Circuit Judge**
v.	:	**YOHN, District Judge**
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	**RAMBO, District Judge**
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' renewed motion for stay pending appeal of order granting declaratory judgment and injunction is **GRANTED**, as follows:

(1) Upon consideration of Defendants' renewed motion for a stay, the stay is **GRANTED**. Defendants will be allowed to conduct only the 2002 Congressional elections using Act 1;

(2) A hearing is scheduled for the purpose of determining whether Act 34 arguably remedies the constitutional violation found by this court in its order of April 8, 2002. Said hearing shall occur at **9:30 a.m. on Wednesday, May 8, 2002**, in Courtroom No. 2, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

on behalf of the panel

Dated: April 23, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	: CIVIL NO. 1:CV-01-2439
Plaintiffs	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:
Defendants	:

ORDER

The background of this order is as follows: On May 2, 2002, the court and counsel for the respective parties held a conference call to outline the issues remaining before the court. As a result of that call, IT IS HEREBY ORDERED that:

(1) The hearing scheduled to take place on May 8, 2002 is CANCELED;

(2) By June 3, 2002, Defendants shall file a status report with the court indicating whether the dispute over the order issued by the Court of Common Pleas for Armstrong County Pennsylvania on March 15, 2002 ("the Armstrong County order") has been resolved. Specifically, the parties shall address the following issues:

> (A) If the matter has been resolved, has the line separating the South Buffalo Township election district from the Eastern Buffalo Township election district been restored to its original

configuration prior to the Armstrong County order?;

(B) If the line has not been restored, did the Armstrong County order result in a movement of population between congressional districts?;

(C) If the line drawn by the Armstrong County order resulted in a movement of population between congressional districts, how many people have been moved?;

(D) If the Armstrong County order issue has not been resolved, are Defendants pursuing the matter through litigation?;

(3) Plaintiffs shall file by any objections to Defendants' submission with the court by June 18, 2002.

SYLVIA H. RAMBO
United States District Judge
on behalf of the panel

Dated: May 2, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	: CIVIL NO. 1:CV-01-2439
Plaintiffs	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:
Defendants	:

ORDER

On May 2, 2002, the court issued an order staying the court's remedial hearing for sixty days. The court also required Defendants to file a status report at the conclusion of this period. On June 3, 2002, Defendants filed the required status reports indicating that the Armstrong County, Pennsylvania Board of Elections has petitioned the Armstrong County Court of Common Pleas to vacated its order that re-drew the boundary between the Eastern and Southern Buffalo Township voting precincts. That court has set the matter for a hearing on July 15, 2002.

Accordingly, IT IS HEREBY ORDERED that:

(1) By August 19, 2002, Defendants shall file a status report with the court indicating whether the dispute over the order issued by the Court of Common Pleas for Armstrong County Pennsylvania on March 15, 2002 ("the Armstrong County order") has been resolved. Specifically, the parties shall address the following issues;

(A) If the matter has been resolved, has the line separating the South Buffalo Township election district from the Eastern Buffalo Township election district been restored to its original configuration prior to the Armstrong County order?;

(B) If the line has not been restored, did the Armstrong County order result in a movement of population between congressional districts?;

(C) If the line drawn by the Armstrong County order resulted in a movement of population between congressional districts, how many people have been moved?;

(D) If the Armstrong County order issue has not been resolved, are Defendants pursuing the matter through litigation?;

(2) Plaintiffs shall file by any objections to Defendants' submission with the court by September 3, 2002.

SYLVIA H. RAMBO
United States District Judge
on behalf of the panel

Dated: June 19, 2002.